Supreme Court of the United States

OCTOBER TERM, 1942.

No. 193.

PHILLIPS-BUTTORFF MANUFACTURING COMPANY,
PETITIONER,

VS.

WILLIAM JOHNSON, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

REPLY BRIEF OF RESPONDENT, WILLIAM JOHNSON.

CLAUDE CALLICOTT,
JAMES C. HAVRON,
Nashville, Tennessee,
Attorneys for Respondent.

INDEX

CITATIONS

Cases:

Statute:

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 193.

PHILLIPS-BUTTORFF MANUFACTURING COMPANY, PETITIONER,

VS.

WILLIAM JOHNSON, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE.

REPLY BRIEF OF RESPONDENT, WILLIAM JOHNSON.

OPINION BELOW.

The opinion of the Supreme Court of Tennessee filed April 4, 1942 (R. 30-34), is reported in 160 S. W. 2d 893.

JURISDICTION.

The petition for a writ of certiorari invokes the jurisdiction of this Court under Section 240 of the Judicial Code, 28 U. S. C. A., Sec. 347 (Pet. 8). The respondent says that this Court has no jurisdiction under Section 240 of the Judicial Code, 28 U. S. C. A., Sec. 347, to review

by certiorari the final judgment or decree of the Supreme Court of the State of Tennessee in this cause. The said Sections relied upon by the petitioner provide for certiorari in certain cases to the Circuit Courts of Appeals and the Court of Appeals of the District of Columbia, but make no provision whatsoever for review by certiorari of decisions of the highest Courts of the respective States. The petition, therefore, should be denied for the reason that it does not properly invoke the jurisdiction of this Court.

STATEMENT OF THE CASE.

The respondent filed his suit in the Chancery Court of Davidson County, Tennessee, to recover unpaid minimum wages, unpaid overtime compensation, and liquidated damages, under Sections 6 and 7 of the Fair Labor Standards Act of 1938, Ch. 676, 52 Stat. 1060, 29 U. S. C. A., Secs. 201-219 (R. 1-4, 7-11). The case was tried upon a stipulation of facts (R. 16-22). These facts have been properly summarized in the brief filed by the Administrator of the Wage and Hour Division, United States Department of Labor, as *Amicus Curiae* (See pp. 3-5 of said Brief). The respondent adopts the said summarization of the facts as his own. A further statement of facts will be made in the following argument.

The Chancery Court held that the respondent was entitled to the benefits of the Act and decreed him a recovery (R. 22-29). The decree of the Chancellor was affirmed by a decree of the Supreme Court (R. 30-34).

QUESTION PRESENTED.

Is a watchman who guards and protects three buildings and all the contents thereof, in one of which his employer has its executive offices, in another of which it has a shop wherein goods are manufactured, and a wholesale store and warehouse from which the products of said shop and other goods are sold, and in another of which his employer has a wholesale warehouse from

which goods are sold, 35% of the aforesaid products of said shop and goods sold from said wholesale stores and warehouses being sold and shipped to purchasers in other States, "engaged in commerce or in the production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act of 1938?

ARGUMENT.

This case is controlled by *Kirschbaum* v. *Walling*, 86 L. Ed. 1054 (June 1, 1942). The petitioner seeks to distinguish the cases, asserting, first, that the business carried on by petitioner at the First and Second Avenue buildings was predominantly intrastate in character (Pet. 2, 8, 9), and, second, that the respondent spent only a small portion of his time in guarding and protecting the two buildings and their contents (Pet. 3, 8, 9).

Fifty men worked regularly in the shop where goods were manufactured. Forty men worked regularly in the wholesale store and warehouse. "Large quantities" of goods were produced and sold. 35% of all goods produced and sold were sold and shipped to purchasers in other States (R. 17-18).

Respondent was physically in the building on First Avenue and Second Avenue at least one hour each night. He made additional trips each week to said buildings. He spent thirty minutes out of each hour making his rounds in the Third Avenue building in which were located the executive offices. Most of the time when respondent was not physically making his rounds was spent in the Third Avenue building. The respondent was charged at all times with the responsibility for all the buildings and the contents thereof (R. 19-20). The Chancellor held that respondent was on duty as to all the buildings and the contents thereof during all the hours of his service (R. 25). The Supreme Court of Tennessee held the same (R. 33).

The Fair Labor Standards Act of 1938 does not require that any definite percentage of employer's busi-

ness be of an interstate character, or that an employee spend any definite percentage of his time in interstate commerce or in the production of goods for interstate commerce as a requirement of coverage. *United States* v. *Darby*, 312 U. S. 100, 123, 85 L. Ed. 609, 622; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607; *Santa Cruz Co.* v. *National Labor Relations Board*, 303 U. S. 453, 467; *Wood* v. *Central Sand & Gravel Co.*, (D. C. W. D. Tennessee) 33 F. Supp. 40. The amount of goods protected by respondent and moving in interstate commerce was very substantial, and the maxim *de minimis* could not possibly have any application thereto. The petitioner's allocation of respondent's time between interstate business and intrastate business (Pet. 3-8) is wholly artificial and inaccurate. However, even if the respondent had spent only 10% of his time in the production of goods for interstate commerce, he would under the foregoing authorities be entitled to a recovery.

Respectfully submitted,

CLAUDE CALLICOTT,
JAMES C. HAVRON,
Attorneys for Respondent.